SUPREME COURT, U.S.

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No. ~~1119~~ 59

In the

Supreme Court of the United States

OCTOBER TERM, 1966 7

CHICAGO GRAIN TRIMMERS ASSOCIATION, INC., AND NEW AMSTERDAM CASUALTY COMPANY,
Respondents,

vs.

R. C. ENOS, Deputy Commissioner,

and

AGNES M. BANKS, widow of JOHN J. BANKS, deceased, and representative of JAMES M. BANKS, JANICE BANKS, AND CATHERINE M. BANKS, minor children of JOHN J. BANKS, deceased,
Petitioner.

ANSWER TO PETITION FOR WRIT OF CERTIORARI

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The Scheffer Press, Inc.—ANdover 3-6850

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I.

THE PETITIONER HEREIN IS NOT A PERSON AUTHORIZED BY LAW TO PETITION FOR A WRIT OF CERTIORARI.

The petitioner suggests that the jurisdiction of this court is invoked pursuant to Title 28 U.S.C., §1254(1). The section relied on clearly provides that a petition for Writ of Certiorari may be filed only by a party to the proceedings in the Court of Appeals. The petitioner

herein was not a party in the Court of Appeals. The pertinent portion of Section 1254(1) is as follows:

> "Cases in the Court of Appeals may be reviewed by the Supreme Court * * *" (1) by Writ of Certiorari granted upon the petition of any *party* to civil * * * case, before or after rendition of judgment or decree." (Emphasis ours) (28 U.S.C., §1254(1))

Agnes Banks was not a *party* to the cause in the Court of Appeals and, therefore, by virtue of the provisions of Title 28 U.S.C., §1254(1), the petition for Writ of Certiorari filed herein is unauthorized.

The cited case of *International U., United A.A. and A.W.* v. *Scofield,* 382 U.S. 205, 86 S. Ct. 373 (1965) does not authorize the filing of a petition to intervene for the first time in the Supreme Court of the United States. In that case the petition to intervene was presented to the Court of Appeals and was denied, while the case was pending in the Court of Appeals. Under those circumstances this court permitted the parties so denied to seek a petition for Writ of Certiorari and after finding that the intervention petition was improperly denied, did direct that the party could properly seek a petition for Writ of Certiorari, it having properly and timely petitioned to intervene in the Court of Appeals.

In this case, no such timely intervention was sought by the petitioner. When the Deputy Commissioner's ruling was appealed to the Federal District Court, Agnes Banks, through her attorney, was served with a copy of the Complaint. No attempt was made to intervene at that time. After the ruling in the Federal District Court on June 2, 1965, a notice of appeal was filed advising that an appeal would be sought to the United States Court of

Appeals for the Seventh Circuit. A copy of this notice of appeal was served on Harold A. Liebenson, attorney for Agnes Banks, on July 26, 1965. (A. 105) Again, no attempt was made to intervene by the petitioner nor was any effort made to intervene from the time of the decision reversing the award on July 13, 1966 to the denial of the petition for rehearing on October 6, 1966. The first request to intervene was not made until after the initial 90 day period to seek a Writ of Certiorari had been extended by Justice Tom C. Clark in response to a telegraphic request by attorney Harold Liebenson. That telegraphic motion to extent time was also improper and unauthorized as it was not made by a party to the cause in the Court of Appeals.

The only parties to the cause before the District Court and in the United States Court of Appeals were Chicago Grain Trimmers Association, Inc. and New Amsterdam Casualty Company, Plaintiffs-Appellants, and R. C. Enos, Deputy Commissioner, Defendant-Appellee.

By virtue of the provisions of Title 28 U.S.C., §1254(1) the petitioner herein is not authorized to request the issuance of a Writ of Certiorari nor was petitioner a person authorized to request the extension of time.

II.

THE DECISION OF THE COURT OF APPEALS DOES NOT CONFLICT WITH OTHER DECISIONS NOR DOES IT CONFLICT WITH ANY SECTION OR PURPOSE OF THE LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT.

Section 921 of the Longshoremen's and Harbor Workers' Compensation Act provides for judicial review of a compensation order by the commencement of proceedings in

the Federal District Court for the district in which the injury occurred within 30 days after the entry of the order. (Title 33 U.S.C. §921)

Section 922 of the Longshoremen's and Harbor Workers' Compensation Act provides for the modification of a compensation order on the application of a party on the ground of a change in condition or because of a mistake in a determination of fact by the Commissioner and request for such modification may be filed within 1 year from the date of the order or 1 year from the date of last payment. (Title 33 U.S.C. §922)

The petition for Writ of Certiorari herein confuses the 30 day period in which the basic issues of liability may be reviewed by appeal through the Federal Court system with the 1 year period in which a request for modification may be filed with the Deputy Commissioner. The petition further confuses the nature of the issues which may be raised only on appeal to the Federal District Court with the nature of the question which may be determined on a petition for modification.

The opinion of the Court of Appeals herein clearly demonstrates that the principle of res judicata must be applied to administrative decisions where the second proceeding involves the same claim or the same transaction and applies to an adjudication of past facts. The decision of the Court of Appeals does not impair the purpose of a modification hearing under Section 922.

If the contention of petitioners herein were accepted, there would be no need for judicial review as provided in Section 921 as any party could continually relitigate the entire case by filing a Section 922 petition within 1 year. That procedure quite obviously would be destructive of

the entire administrative process and would be most harmful to the employee who could be subjected to constant litigation challenging his right to compensation even after an award had been entered. An employee under petitioner's interpretation of Section 922 could be compelled to re-establish his right to compensation whenever he found it necessary to petition for additional compensation or medical benefits upon a change of condition.

The initial briefs in the Court of Appeals did not suggest that the second claim of Agnes Banks was intended or could be a Section 922 petition. The opinion however in its completeness pointed out in a footnote that the appellee's brief conceded that the second claim was not filed within the 1 year limitation of Section 922. That quotation of an erroneous comment in appellee's brief had no affect on the court's decision as the opinion in no way rested on any element of time. The petition herein nonetheless belabors that footnote comment and ignores the court's statement that Section 922 is inapplicable because the claim did not dispute the findings of fact made by the Deputy Commissioner. The court cited *Flamm* v. *Hughes*, 329 F. 2d 378, 380 (2d Cir. 1964) as authority for its belief that a section 922 petition for modification because of mistake must dispute the findings of the first hearing.

The petition here at Page 15 erroneously attacks *Flamm* v. *Hughes* as authority with the statement that it involved a constitutional issue only. A reading of the entire case shows that after the constitutional issue was decided, the court in the *Flamm* case turned to the question of the validity of the claim as a claim under Section 922. The court held that it did not qualify as a Section 922 claim for the reason that although so labeled, it did not

dispute findings of fact originally made. Here also the second claim did not attack the initial findings but, by its allegations and the conduct of the petitioner and her counsel, it was considered a new case. The Deputy Commissioner stated the second hearing would proceed because it was a new claim under a new date. (A. 21) No one during all of the proceedings before the Deputy Commissioner made any suggestion that a mistake had been made or that original findings should be re-examined.

The entire concept was to forget the first hearing and start over. To start over is not the purpose of the reopening provision of the Longshoremen's and Harbor Workers' Compensation Act or of any other compensation act. The purpose of this type of provision is described in Larson's Workman's Compensation Law, Vol. 2 at Page 330:

> "This provision is a recognition of the obvious fact that, no matter how competent a Commissioner's diagnosis of claimant's condition and earning prospects at the time of the hearing may be, that condition may later change markedly for the worse, or may improve, or may even clear up altogether. Under the typical award in the form of periodic payments during a specified maximum period or during disability, the objectives of the legislation are best accomplished if the Commission can increase, decrease, revive or terminate payments to correspond to claimant's changed condition. * * *"

The author further stated in §81.32 at P. 333 when discussing the issues that are relevant in reopening that:

> "In a reopening proceeding, the issue before the board is sharply restricted to the question of extent of improvement or worsening of the injury on which

> the original award was based. If the original award held that there was no connection between the accident and the claimant's permanent disability, there is nothing to reopen, and claimant cannot retry the issue of work-connection through the device of a reopening petition. Conversely, when the employee reopens to show increased disability, the insurance carrier cannot raise the basic issue of liability. * * *"

The petition herein repeatedly suggests that Section 922, the reopening provision of the Longshoremen's and Harbor Workers' Compensation Act, was enacted because of the concern of Congress of the application of the doctrine of res judicata. We know of no evidence or authority for that assertion and none was cited in the petition. The purpose of the section is as described by Dean Larson.

The holding of the Court of Appeals herein requires only that an employee must assert every basis for liability in his original claim and that the employer must assert each defense to liability in the first claim and that alternative theories of liability or alternative defenses cannot be withheld to be raised in subsequent proceedings for modification. The 3 cases cited in the petition on Page 8 are not in conflict with this holding.

In *Candado Stevedoring Co.* v. *Willard,* 185 F. 2d 232 the longshoreman claimed additional compensation because of continuing disability after an initial finding that the accident arose out of and in the course of the employment and after an initial award. The opinion here is in no way in conflict with the case as the opinion here does not suggest that the nature of an employee's disability cannot be re-evaluated upon a showing that it has increased, been extended or even diminished.

In the second case cited, *American Mutual Liability Co.* v. *Lowe,* 85 F. 2d 625, the employee also asked for a re-evaluation upon new evidence that the extent of his disability had continued for a longer period than initially contemplated. The opinion herein in no way suggests that that type of re-evaluation or request for modification is not permissable.

In *Seaboard Marine Repair Co.* v. *Cardillo,* 166 F. 2d 431, the second claim was clearly captioned a Section 922 petition in that it requested a review and modification of the first order and specified the evidence in the first case that the Deputy Commissioner had overlooked. After reviewing that earlier testimony and hearing additional testimony, the order was modified regarding the question of notice to the employer. Such is not the case here as there was no request in this case to review earlier testimony. Every effort was made to prevent reconsideration of testimony in the first case such as that of the claimant that her husband had complained of headaches, light headedness, had been listless and despondent and could not hold a good conversation for days prior to the alleged rope incident of January 30, 1961 (A-78, 80)

The holding in this case by the Court of Appeals is not in conflict with the cases cited but is a ruling absolutely essential to an orderly administration of the Act. If the contention of petitioners herein is accepted, then in each of the cases cited where the petitioner sought additional compensation for a continuing disability, he could have been forced by the employer to first re-establish his basic entitlement. Such is obviously not the intent of Section 922.

It is, therefore, the nature of the claim presented, not the time it was filed or the name it was given that makes

Section 922 inapplicable. The arguments and citations as to when a Section 922 must be filed and how soon it must be acted upon are irelevant upon a determination that the second claim cannot be considered in the nature of a 922 petition.

III.

THE RESULT REACHED IN THE COURT OF APPEALS DECISION IS REQUIRED BY TWO INDEPENDENT REASONS IN ADDITION TO THE APPLICATION OF THE DOCTRINE OF RES JUDICATA.

A. A $19,000 Settlement Without The Written Approval Of The Employer Constitutes An Absolute Bar To A Subsequent Claim For Compensation.

Section 933(g) of the Longshoremen's and Harbor Workers' Compensation Act provides for the rights of the employer and the employee when an action is brought by the employee or his representative against an allegedly negligent third party. The pertinent portions of that section are as follows:

> "(g)If a compromise with such third person is made by the person entitled to compensation or such representative of an amount less than the compensation to which such person or representative would be entitled to under this chapter, the employer shall become liable for compensation as determined in subdivision (f) of this section *only if such compromise is made with his written approval.*" (73 Stat. 391, Title 33 U.S.C. Sec. 933 (g) (Emphasis ours)

Agnes Banks brought a negligence action against the Norris Grain Company in the District Court for Northern Illinois. A judgment of $30,000 was entered and thereafter when the trial judge indicated he would grant a new trial, Agnes Banks compromised that third party action for a total sum of $19,000. The settlement of the

case for $19,000 was done without the written approval of the employer. It, therefore, clearly violated the provisions of Section 933(g). Agnes Banks in this case settled the case without the written consent of the employer and, therefore, has forfeited any right to seek additional compensation from the employer. It is so stated in *Marlin* v. *Cardillo,* 95 F. 2d 112 (C.A.D. 1938) at Page 114:

> "* * *The thing petitioner did is the thing which* paragraph (g) of section 33 says *cannot be done except by surrendering all further claim against the employer.* The language used by Congress is so definite and unmistakable in its purpose that to read into it, as petitioner would have us, the proviso that it is to apply only if the carrier is damaged by the compromise, would be a usurpation of legislative power, and in this view it is not for us to inquire whether there is a good reason or not for desiring the rule to be as petitioner insists, *for we are impelled by the plain terms of the Act to apply it as it is written."* (Emphasis ours)

B. There Was No Competent Evidence To Support A Causal Relationship Between The Fatal Fall At Home And Decedent's Work.

In the second hearing before the Deputy Commissioner, it was agreed as in the first hearing that the injuries sustained at home on January 30 caused the death of John Banks. The only proof offered to connect that fall at home with the alleged rope incident at work was Dr. I. Joshua Spiegel. He first stated that there might or could be a causal relationship between the rope incident and the fall at home. However, the hypothetical question propounded to him was not clear and when the Deputy Commissioner clarified the facts of the hypothetical question, the witness reversed his opinion and stated that it was impossible. The doctor's testimony in this regard is as follows:

"Deputy Commissioner Enos: The testimony is that this gentleman came to the top of the stairs and he pitched forward, and went down the stairs, not touching the stairs with any part of his body; that he fell, struck his head on the concrete floor below. I would like to know whether or not from a medical standpoint that sort of thing is practical?

The Witness: It's impractical. It's impossible not to touch the steps, because the hypothetical describes two walls, so he couldn't fall down the stairwell. He had to fall forward down the continuity of steps.

Q. There was a set of 11 steps there.

A. He would have to fall forward.

Q. The testimony is that he pitched forward down those steps and no part of his body touched those steps as he went down.

A. *I do not see how that is possible, unless as I told Mr. Braun, he took a running start.* To clear the steps would be if the step was 10 inches, 110 inches, it would almost be 10 feet.

Q. Do you know of any medical—anything in the medical literature that would account for anything like that?

A. No, sir. He couldn't clear 10 feet. It is approximately 10 feet. I just figured it out, 11 steps, and if he is falling down like this (indicating), if he is falling even just like this (indicating), as he fell *he has to fall on the steps.* Ten feet is a respectable broad jump. Here is 10 feet, from here (indicating) to here.

Q. You could not explain that from a medical standpoint how a man could pitch forward and clear the entire steps, land on his—

A. There are some rare diseases, like tetanus, certain poisons, where the muscles go into tremendous contractions, and in fact that is what kills the patient.

Q. You did testify, did you not, Doctor, that in your opinion the cause of this man falling was loss of consciousness by reason of an acute subdural hematoma?

A. I did, yes, sir.
Q. What would be the natural reaction?
A. Just a fall—
Q. Would he have a tendency to slump?
A. He could slump.
Q. And tumble down the stairs?
A. Yes, he could.
Q. I presume if he was unconscious when he started, that that would account for the fact that he did not use his arms to protect himself in any way going down?
A. That is a proper assumption. He could fall straight. He wouldn't of necessity have to slump down into a huddle. He could fall straight down and continue falling, *but he would have to hit the steps.*" (A 54, 55) (Emphasis ours)

This testimony that the fall as described was impossible under the circumstances leaves the record without proof, that there could be a relationship between the work and the decedent's fatal fall in his home. The award being without substantial foundation in factual proof, the Court of Appeals would be required to reverse the award on that ground if it had not done so on the finding that the award was barred by the doctrine of res judicata.

Therefore, even if the court were persuaded to grant a Writ of Certiorari by the plea of the petition that the case involved a widow and minor children, it can be seen that the same result would obtain upon a consideration of the 2 separate and complete defenses presented to the Court of Appeals but not decided because of the determination that the doctrine of res judicata is applicable.

The sympathy argument of the petition herein is also far less compelling when it is noted that Agnes Banks was represented by counsel from the very outset. John Banks

died on February 12, 1961 12 days after he sustained fatal injuries in his own home. With advice of counsel, Agnes Banks immediately filed the first claim on February 20, 1961. (A. 77) During the second trial, Agnes Banks stated that she had been told about the rope falling incident in February, 1961, prior to the first trial. (A. 36) Also, prior to that trial, she had reviewed the entire matter in great detail with her attorney. She had also gone over it with Lawrence Banks, brother of her husband and president of the Grain Trimmers Association, and with her brother, Frank Costello, an employee of the Grain Trimmers Association. (A. 36, 37) Agnes Banks, Lawrence Banks and Frank Costello each testified in the first trial on behalf of the claimants and each failed to mention the alleged January 30 rope incident.

This conscious withholding of an alleged alternative theory is the precise evil which must be eliminated by an application of the doctrine of res judicata.

CONCLUSION.

The respondents respectfully submit that the petitions herein be denied for the reason that the petitioner is not authorized by law to request an extension of time or to request that a Writ of Certiorari be issued and for the further reason that there is no basis or authority to justify an initial request for intervention in this Court.

It is further respectfully submitted that the petition for Writ of Certiorari be denied for the reason that the holding of the court below is essential to insure the rights of employers and employees in compensation proceedings and to insure orderly administration of the Longshore-

men's and Harbor Workers' Compensation Act and for the reason that the decision below is not contrary to any decision of this Court and is not in conflict with decisions of other Courts of Appeal.

Respectfully submitted,

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